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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. _____

WINTHROP TAYLOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Second Circuit denying the petition herein to review and modify a judgment of the United States Circuit Court of Appeals for the Second Circuit. A transcript of the record of the case is furnished herewith in accordance with Rule 38 of this Court including the subsequent proceedings in the United States Court of Appeals appended hereto consisting of the respondent's motion to dismiss and the opinion of the Court of Appeals.

Jurisdiction

The statute under which jurisdiction is invoked is Title 28, United States Code, Section 1254, formerly Section 347 (Judicial Code, 28 U. S. C., Section 240, Amended) (a).

Summary Statement of the Matter Involved

The decision of the United States Court of Appeals which this Court is asked to review is in a proceeding in equity based upon a petition and affidavit filed pursuant to the authority of the decision of this court in *Hazel-Atlas Glass Company* v. *Hartford-Empire Company,* 322 U. S. 238. The petition requested the Court of Appeals to review and vacate its judgment entered April 22, 1935, affirming a deficiency assessment for personal income tax against the petitioner for the year 1929 in the sum of $51,353.70 and to alter and modify said deficiency judgment to the sum of $5,319.89. The opinion of the Court of Appeals (then the Circuit Court of Appeals for the Second Circuit) in the original case affirming the deficiency assessment in April, 1935, is reported in *Taylor* v. *Commissioner,* 76 Fed. 2d 904.

In the proceeding to modify the deficiency judgment *all* the allegations of the petition are admitted and the requested writ does not involve any factual review. The respondent's defense, so far as it forms the basis for the decision of the Court of Appeals and so far as this application for the writ is concerned, is that a similar petition was denied by the same Court *and that the new facts presented for the first time* by the petitioner do not justify the granting of relief under the authority of Hazel-Atlas (supra). The factual background disclosed by the record and conceded by the respondent follows:

The Commissioner of Internal Revenue disallowed for the petitioner's income tax for the year 1929 a *capital* gain of $490,006.67 realized from the sale of 14,000 shares of Public Service Corporation of New Jersey held by the petitioner for more than two years prior to sale upon which a tax was paid at the rate of 12½%. The *exclusive* ground stated in the deficiency letter by the Commissioner for this disallowance was that the petitioner was held to be a stock-trader *based upon the large dollar volume of the secur-*

ities sold (Paragraph "Third" of petition, p. 2). The Commissioner, therefore, treated the capital gain reported as ordinary income taxable at higher rates which resulted in the deficiency tax of $51,353.70.

From the above determination the petitioner appealed to the Tax Board. The Tax Board found that Public Service shares held for more than two years had been sold and that a gain had been realized therefrom but held that it was not a *capital* gain because the Board sustained the Commissioner's determination that the petitioner was a stock-trader based upon the volume of the stock sales (Pars. "Third" and "Eleventh" of petition, pp. 3, 4 and 7).

On appeal from the Tax Board the Circuit Court of Appeals rejected the stock-trader theory and held that the petitioner as "a busy lawyer" was entitled to the limitation in tax on profits realized from the sale of securities held for more than two years prior to sale (Opinion *Taylor* v. *Commissioner,* 76 Fed. 2d, 904). The Circuit Court of Appeals held, however, with respect to a question raised for the first time at the Tax Board hearing concerning the length of time the 14,000 shares had been held prior to sale, that because of lack of evidence of the sales of other Public Service shares (not available at the hearing because no pertinent or affirmative issue with respect hereto had been raised by the Commissioner in the deficiency determination or answer) that it was unable to determine with certainty whether the particular 14,000 shares from the sale of which the capital gain had been realized had been held for more than two years prior to sale. The Circuit Court of Appeals commented, however, that it was *"unlikely"* that such was not the case since it appeared that more than 14,000 shares had been held for more than two years prior to sale, that there had been no prior or interim sales and all the shares had been sold in October-November, 1929. The Court commented that this aspect had been *"left in the air"* and that the decision was *"unsatisfactory"* (Opinion, *Taylor* v. *Commissioner,* 76 Fed. 2d, 904; paragraph "Fourth" of petition, p. 4; pp. 15, 16, affidavit attached to petition).

The petitioner, feeling aggrieved, applied to the appropriate departments of the Government for remedial relief with the result that the Department of Justice on January 19, 1939, addressed a memorandum opinion to the Treasury Department stating that both the Tax Board and the Circuit Court had been led by the *"erroneous insistence of representatives of the Government"* into making and sustaining a *"fundamental erroneous deficiency determination"* and that:

> *"We find that the petitioner in good conscience to be entitled to relief;"*

and that the case was one

> *"in which relief ought to be afforded"* (Pars. "Fifth", "Eighth" and "Twelfth" of petition, pp. 4, 5, 6, 7).

Thereafter the petitioner located the records of all the Public Service transactions and submitted them to the Treasury Department which, as a result of recomputation and giving effect to the capital gain limitation in tax authorized by the decision of the Court of Appeals, *made a determination dated October 17, 1944, that the correct deficiency in tax for the year 1929 was $5,319.89* (pars. "Sixth" and "Thirteenth" of petition, pp. 5, 7; p. 16, affidavit attached to petition).

The foregoing facts with reference to the opinion of the Department of Justice and the determination by the Treasury Department of the correct deficiency were *not known to the petitioner in 1944 when he presented the former petition for a review of the deficiency judgment and for a rehearing* (Par. "Eighth" of Petition, pp. 5, 6). Such facts did not become known to the petitioner until several years later when, having paid the erroneous deficiency in full, with interest ($108,842.12), he instituted an action for refund in the District Court for the Eastern District of New York (Par. "Tenth" of Petition, pp. 6, 7).

The answer of the defendant-collector in the refund action admitted the facts stated above, but pleaded as a

bar to a refund, based upon the doctrine of res judicata, the unmodified deficiency judgment of the Circuit Court. The District Court stated there was no longer any factual dispute but accepted the defense of res judicata and dismissed the refund action (Opinion, Kennedy, J., p. 11 of Petition). From this decision the petitioner has appealed. This appeal is pending but if the District Court is correct the petitioner will not be able to obtain a refund so long as the deficiency judgment remains unmodified (Pars. "Tenth", "Fourteenth" and "Fifteenth" of Petition, pp. 6, 7, 8).

Accordingly the petitioner filed the new petition to the Court of Appeals submitting *for the first time* the facts with reference to the opinion of the Department of Justice and the determination by the Treasury Department of the correct deficiency and requesting the Court to modify the deficiency so that it would be in accordance with the determination of the Treasury Department. In denying the petition the Court of Appeals stated in its opinion that the only new facts presented were the opinion of the Department of Justice and the determination by the Treasury Department of the deficiency which were held as affording *"no basis whatever"* to modify its former judgment. *The Court of Appeals suggested, however, that the petitioner could apply for an Act of Congress for relief* (Opinion, Court of Appeals, appended hereto).

As the matter stands the Treasury Department of the United States, through what the Department of Justice has characterized the "erroneous" action of representatives of the Government, has collected from the petitioner and retains an amount of (tax) moneys, with interest, approximately ten times the concededly correct amount—an unjust enrichment which the Treasury Department asserts it is entitled to retain because of the unmodified deficiency judgment as to which it is also asserted the Court of Appeals lacks authority to modify.

Questions Presented

(1) Do not the factual findings and determinations of departments of the government rendered in the routine discharge of public duties constitute a true basis for an original proceeding in equity to vacate and modify erroneous judgments?

(2) Is not the unchallenged and conceded determination of the Treasury Department of the United States correcting a tax deficiency in favor of the taxpayer conclusive upon the United States Court of Appeals in a proceeding in equity to modify an admittedly erroneous deficiency tax judgment?

(3) Is the exercise of the equity powers of the United States Court of Appeals to vacate and modify its judgments limited to cases where fraud has caused the error, or should not such authority likewise be exercised where the fundamental error is conceded by the respondent party?

(4) Where a judgment involves a concededly fundamental error which is "sufficiently gross" and "manifestly unconscionable" is it not *the duty* of the Court of Appeals to correct the same by modifying its judgment in accordance with the conceded facts?

Reasons Relied on for Allowance of Writ

The questions above presented are of public importance and involve issues of general law in the relations of the citizen and his Government in conjunction with principles of fundamental justice in the correction of egregious error in the collection of taxes. Specifically, the decision of the Court of Appeals involving the questions presented is in conflict with the applicable decisions of this Court in the case of Hazel-Atlas and similar decisions respecting the exercise of equity powers to set aside and alter judgments

concededly and grossly erroneous and manifestly unconscionable. The decision of the Court of Appeals is also in conflict with applicable decisions of this Court establishing fundamental rules with respect to the conclusiveness of unquestioned factual findings of Government Departments,—and specifically with respect to a factual determination of the Treasury Department made in the interest of just and fair administration of Federal taxation.

WHEREFORE your petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court.

May, 1952.

WINTHROP TAYLOR,
Petitioner,

By JACKSON A. DYKMAN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. .....

WINTHROP TAYLOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Delivered in Courts Below.

Taylor v. *Commissioner*, 76 Fed. 2d 904;
Taylor v. *Commissioner*, Decision and Opinion of Court of Appeals dated March 18, 1952, appended herewith.

Jurisdiction

Statute under which jurisdiction is invoked is Section 347 Title 28, United States Code, Section 1254, formerly (Judicial Code, 28 U. S. C. Section 240, Amended (a)).

In accordance with Rule 38 of this Court it is believed that jurisdiction is sustained because of conflicts with decisions of this Court involving questions of general law of public importance in the interest of just and fair Federal tax administration and also as concerns the duty generally of Federal courts to remedy fundamental errors involved in their judgments.

Cases which enunciate the principle of granting writs where questions of public importance are involved are:

Magnum Import Company v. *De Spoturno Coty*, 262 U. S. 159, 163;
National Labor Relations Board v. *Waterman, S. S. Corporation*, 309 U. S. 206.

This application for a writ does not involve any factual review of evidence *all* the allegations of the petition having been admitted.

Statement of Case

The case, so far as material to the consideration of this application, is stated in the petition (pp. 2-5).

Specifications of Errors

The errors which petitioner will urge if a writ of certiorari is granted are that the Court of Appeals for the Second Circuit erred in denying the petition for the following reasons:

(1) That the determination of the true deficiency by the Treasury Department was conclusive upon the Court of Appeals and it was its duty to modify the deficiency judgment in accordance therewith.

(2) That the Court of Appeals should have granted the petition under the authority of *Hazel-Atlas Glass Company* v. *Hartford-Empire Company*, 322 U. S. 238.

ARGUMENT

POINT I

The decision of the Court of Appeals failed to accord due force and effect to the conceded factual determination of the Treasury Department modifying the tax deficiency in the sum of $5,319.89. Such decision is not in accordance with applicable decisions of this Court.

It has long been settled by this Court as a matter of general policy that the actions and determinations of public officers and governmental departments rendered in the routine course of the discharge of public duties within the scope of their authority are presumptively correct and, unless challenged for cause, are *conclusive* upon all parties, *including the courts.* This rule of law applies to tax determinations of the Treasury Department.

Milliken v. *United States,* 283 U. S. 15, 19;
Ross v. *Stewart,* 227 U. S. 530, 535;
Ross v. *Day,* 232 U. S. 110, 117;
Bates & Guild Co. v. *Payne,* 194 U. S. 106, 109;
Mullan v. *United States,* 140 U. S. 240, 245;
Wilkes v. *Dinsman,* 48 U. S. 89, 131;
Johnson v. *Towsley,* 13 Wallace 72, 83.

The same presumption of correctness established by these decisions which obtained in favor of the Commissioner's original determination of the deficiency (which, to overcome, the petitioner was obliged to challenge) obtains when the same official or department makes a corrective determination in favor of the petitioner and which, conceded and unchallenged, becomes conclusive.

Vital considerations were presented by the petitioner with respect to which the Court of Appeals apparently failed to accord proper recognition, the Court stating that they afforded "no basis whatever" to modify the erroneous

judgment. These are: (a) the opinion of the Department of Justice rendered (January, 1939) to the Treasury Department in the discharge of official duty advising that the deficiency judgment was fundamentally erroneous and that the error had been caused by the "erroneous insistence of the representatives of the Government", and that the petitioner in good conscience was entitled to relief; (b) more essential, the redetermination (October, 1944) of the deficiency by the Treasury Department, based upon recomputation, that the true deficiency was $5,319.89, and (c) the unqualified admission by the respondent—in effect the Treasury Department—that the Department of Justice had advised it as aforesaid and that the Treasury Department had found the true deficiency to be as stated.

It is submitted that these facts *presented to the Court for the first time,* constitute a proper and decisive basis for a proceeding de novo in equity for the modification of the judgment.

Hazel-Atlas (supra), and cases cited therein;
Johnson v. *Towsley,* 13 Wallace 72, 84.

POINT II

The Court of Appeals apparently held that the doctrine of Hazel-Atlas did not apply because the deficiency judgment was not obtained by "fraud". Such a conclusion is not in accordance with the decision of this Court in Hazel-Atlas.

The respondent Commissioner, in his answer, contended that Hazel-Atlas does not apply because the deficiency judgment was not obtained through fraud. With this defense the Court of Appeals apparently agreed as it held that the determination of the Treasury Department demonstrating that a gross mistake had been made constituted no basis for modification.

In Hazel-Atlas this Court directed that the judgment, obtained twelve years previously, be vacated, because it had been obtained through fraud. The Court, however, did not limit the application of the equitable rule involved to cases of fraud but clearly stated that fraud was but *"one"* of the circumstances whereunder equity would act. The opinion reads:

> "From the beginning there has existed alongside the term rule a rule of equity to the effect *that under certain circumstances, one of which is after-discovered fraud,* relief will be granted against judgments regardless of the term of their entry." (Emphasis supplied.)

In the instant case the error is "gross", the deficiency judgment being ten times the amount of the true deficiency as subsequently determined by the Treasury Department. What stronger ground can be conceived for the exercise by the Court of its equity powers which the petitioner is invoking?

The rational purpose of the equitable rule involved is to remedy grievous errors no matter what the cause may be—fraud or otherwise. The scope of the opinion of this Court in Hazel-Atlas extends well beyond cases of fraudulently obtained judgments. The Court stated:

> "This equity rule which was firmly established in English practice long before the foundation of our Republic the Courts have developed and fashioned to fulfill a universally recognized need for correcting injustices *which in certain instances are deemed sufficiently gross* to demand a departure from rigid adherence to the term rule." (Emphasis supplied.)

The opinion also states:

> "But where the occasion has demanded, *where enforcement of the judgment is 'manifestly unconscionable'* * * * they have wielded the power without hesitation." (Emphasis supplied.)

The rule, as not being confined to fraud, is similarly stated in *Johnson* v. *Towsley* (*supra*), the Court stating:

> "On the other hand, there has always existed in courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice and wrong *in both judicial* and executive action, however solemn the form which the result of that action may assume, when it invades private rights; *and by virtue of this power the final judgments of courts of law have been annulled or modified* • • •." (Emphasis supplied.)

POINT III

The Court of Appeals, while recognizing as a matter of equity that the petitioner is entitled to relief, declined to modify its judgment. Such negation is not in accordance with the decision of this Court in Hazel-Atlas to the effect that it is the duty of the Court to grant relief where the circumstances are clear and unquestioned.

There is no question as to the error involved. The deficiency judgment, for an amount many times that of the true deficiency, was caused, in the opinion of the Department of Justice, by the "erroneous insistence of representatives of the Government" which misled the Circuit Court of Appeals. The judgment is "manifestly unconscionable" to such an extent that the Court of Appeals, while denying the petition, *suggested that the petitioner could apply to Congress for restitution.* This Court in Hazel-Atlas, in dismissing an analogous suggestion that the petitioner in that case should be relegated to the District Court, stated:

> "Nothing in reason or precedent requires such a cumbersome and dilatory procedure. Indeed the whole history of equitable procedure, with the traditional flexibility which has enabled the courts to grant all the relief against judgments which the equities require,

argues against it. We hold, therefore, that the Circuit Court on the record here presented had both *the duty* and power to vacate its own judgment * * *." (Emphasis supplied.)

Under the circumstances, it is submitted that the Court of Appeals should have remedied the error by modifying its judgment.

CONCLUSION

It is respectfully submitted that the denial by the Court of Appeals of the petition is in conflict with the applicable decisions of this Court both with respect to the conclusive character of the determination of the true deficiency by the Treasury Department and the proper exercise of the equity power expounded in Hazel-Atlas and similar decisions.

It is also submitted that the questions involve principles of general law of public importance and gravity with respect to just and fair imposition and collection of Federal taxes—such as to render appropriate, under the rules of this Court, a review of the decision of the Court of Appeals.

May, 1952.

Respectfully submitted,

OELAND & KUHN,
Attorneys for Petitioner,

By JACKSON A. DYKMAN,
Counsel.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WINTHROP TAYLOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION TO DISMISS PETITION FOR REVIEW OF DECREE

John B. Dunlap, Commissioner of Internal Revenue, by Ellis N. Slack, Acting Assistant Attorney General, moves to dismiss the petition for review of the decree and decision of this Court entered on the 22d day of April, 1935, upon the following grounds:

The petitioner's application for certiorari to review the decision of this Court was denied in 1935. (*Taylor* v. *Commissioner,* 296 U. S. 594.)

In 1944 a petition to review the decision and order of this Court upon the identical grounds presently urged was made by the petitioner and was denied by this Court without opinion on December 6, 1944. Certiorari to review the action of this Court was applied for and was denied in 1945. (*Taylor* v. *Commissioner,* 324 U. S. 871.)

Section 1140 of the Internal Revenue Code * provides an

* SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.

The decision of the Board shall become final * * *

(b) *Decision Affirmed or Petition for Review Dismissed* * * *.

(2) *Petition for Certiorari Denied.* * * * Upon the denial of a petition for certiorari, if the decision of the Board has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; * * *

Section 1005, 44 Stat. 110, of prior Revenue Acts, is identical.

indicated period of time upon the occurrence of which the decision of the Board of Tax Appeals (now The Tax Court of the United States) becomes absolutely final and there is no power in the Board of Tax Appeals or in any other tribunal to modify it thereafter. It was held in *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225, that this statutory provision deprived even the Supreme Court of jurisdiction over a case after its denial of certiorari became final. *A fortiori*, it follows that the jurisdiction of this Court has likewise ended. See also *Monjar* v. *Commissioner*, 140 F. 2d 263 (C. A. 2d).

Hazel-Atlas Glass Co. v. *Hartford Empire Co.*, 321 U. S. 238, relied upon by the petitioner is wholly inapplicable as it involved a "fraudulently begotten judgment".

For the foregoing reasons this Court is without jurisdiction to review the decree and the petition for review should be dismissed.

ELLIS N. SLACK,
Acting Assistant Attorney General.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WINTHROP TAYLOR,
Petitioner,
against
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On reading the petition of the taxpayer, Winthrop Taylor, for a rehearing, it is ordered that the petition be in all respects denied.

It is further ordered that the Per Curiam opinion heretofore filed February 27, 1952, denying the motion to recall the Court's mandate and vacate the decree be and the same hereby is amended to read as follows:

"This is a motion in which the petitioner prays this court to set aside its decision and decree of April 22, 1935 affirming a deficiency in his income tax for the year 1929 as determined by the Board of Tax Appeals, to recall its mandate issued thereon, direct vacation of the decision of the Board of Tax Appeals and to alter the determination of the amount of the deficiency tax to the sum of $5,319.89.

"This taxpayer in 1944 was denied a similar motion where the same facts were presented to the court as here in respect to purchases and sales. The only new proof offered is an intermural memorandum by someone in the Department of Justice to the Treasury Department in 1939, and a recomputation of the petitioner's income tax by the Treasury Department in 1944. This can afford no basis whatever for disregarding our decision. The taxpayer's only remedy, if any there be, lies in an Act of Congress to relieve him.

"Motion denied."

AUGUSTUS N. HAND,
HARRIE B. CHASE,
JEROME N. FRANK,
U. S. C. JJ.

Filed March 18, 1952.